LIBRARY,
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 29 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 73-410

SOO LINE RAILROAD COMPANY,
Petitioner,

vs.

R. H. FULTON d/b/a R. H. FULTON, CONTRACTOR,
Respondent.

REPLY BRIEF OF PETITIONER SOO LINE RAILROAD COMPANY AND BRIEF IN OPPOSITION TO PURPORTED CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI BY RESPONDENT R. H. FULTON

ROBERT A. BROWN, SR.
WENDELL E. KOERNER, JR.
BROWN, DOUGLAS AND BROWN
Pioneer Building
St. Joseph, Missouri 64501
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3080

In the Supreme Court of the United States

No. 73-410

SOO LINE RAILROAD COMPANY,
Petitioner,

vs.

R. H. FULTON d/b/a R. H. FULTON, CONTRACTOR,
Respondent.

REPLY BRIEF

NEW QUESTIONS RAISED BY RESPONDENT'S BRIEF IN OPPOSITION

In his brief in opposition to Soo Line's petition, Respondent Fulton by way of argument has raised questions not offered by the petition. They are:

1. Whether the State of Missouri had sufficient minimum contacts with the Soo Line Railroad Company in the instant case to initially authorize the court to exercise personal jurisdiction over petitioner.

2. Whether Soo Line's objections to the forum could have been obviated by seeking a transfer to the District of Minnesota.

ARGUMENT

Petitioner submits that respondent's discussion in his brief of the "minimum contacts" theory as applied to long arm service of process is not apposite. Although Soo Line opposed the exercise of any jurisdiction over it by the District Court in Missouri, Soo Line has not raised in its petition any issue as to whether or not the court properly determined at the pleading stage that the minimum contacts existed for jurisdiction in a tort action, if such an action lies. As shown by the petition, the question raised is whether or not the District Court in Missouri may properly exercise jurisdiction on the bases of the Missouri Long Arm Service Statute and allegations of tortious conduct, when the plaintiff has no cause of action against Soo Line in tort. Consequently, whether or not the necessary minimum contacts were properly found in this case has no relationship to Soo Line's petition here and is no longer a question applicable to this lawsuit.

In his opposing brief, respondent further claims that the case of *W. D. Lawson and Co.* v. *Penn Central Co.*, 456 F. 2d 419 (6th Cir. 1972), is not in conflict with the opinion of the Eighth Circuit in the instant case, because Fort Worth and Denver Railroad, the initial carrier, was held to have been properly sued in that case under the Carmack Amendment. That Fort Worth and Denver was held to be subject to the jurisdiction of the District Court for the Western District of Tennessee in *Lawson* has absolutely no relationship to the jurisdictional issue in the instant case.

There, Fort Worth and Denver was held to be subject to the court's jurisdiction, because it had an office and did business in Tennessee, which permitted service under a particular Tennessee statute. In the first place, Soo Line

has no office and statutory agent in Missouri, as Fort Worth and Denver did in Tennessee. Moreover, the only applicable provision of the Missouri statute in the instant case is that which provides for personal service on a foreign defendant for an action arising from commission of a tortious act in the state. Respondent had not claimed that Soo Line would be subject to service of process in Missouri under the Carmack Amendment alone, just as Penn Central was not in *Lawson*. Therefore, the applicability of *Lawson* to the instant case is obvious. Since there was no common law cause of action against Penn Central in *Lawson* and it could not otherwise be served in a Carmack action, there was no jurisdiction over it in Tennessee. Likewise, since there is no common law cause of action against Soo Line in Missouri and it may not be personally served in Missouri in a Carmack action, there is no jurisdiction over it in the United States District Court for the Western District of Missouri in this lawsuit.

In *Litvak Meat Company* v. *Baker*, 446 F. 2d 329 (10th Cir. 1971), the Court of Appeals for that circuit held that the Carmack Amendment did not pre-empt a common law action against a carrier contracting under an interstate bill of lading. That court concluded that it merely superseded state legislation relating to interstate shipment of goods under a bill of lading, *Litvak Meat Co.* v. *Baker*, supra, at 335. Clearly, therefore, there was a conflict between the Tenth Circuit and the Sixth Circuit on the issue of preemption prior to the decision of the Court of Appeals in the instant case. In addition, the Fifth Circuit has recognized that a Carmack action is strictly a matter of contract and not an action in tort, *Arnold J. Rodin, Inc.* v. *Atchison, Topeka and Santa Fe Railway Company*, 477 F. 2d 682 (5th Cir. 1973). Obviously, the effect of the decision here by the Eighth Circuit creates a further conflict with the Sixth Circuit. The effect of the Eighth Circuit ruling is

that allegations, which do not state a cause of action, create jurisdiction over the person by forming the basis for service of process. This is contrary, not only to the Sixth Circuit's holdings, but to all reason and logic. Furthermore, no Missouri court has so held.

In suggesting that Soo Line's objection to exercise of jurisdiction by the court in Missouri may have been resolved by seeking a transfer to Minnesota, respondent is making an entirely baseless argument. On August 18, 1970 (Appendix to briefs, p. 8), petitioner filed its alternative motion to transfer this action to the District of Minnesota pursuant to Title 28, Section 1404(a), U.S.C. This motion was opposed by the respondent and obviously not sustained by the trial court. On the other hand, the purpose of the Carmack Amendment being to relieve the holder of a bill of lading from searching out a particular negligent carrier from among those handling an interstate shipment, *Arnold J. Rodin, Inc.* v. *Atchison, Topeka and Santa Fe Railway Company*, 477 F. 2d 682 (5th Cir. 1973), the respondent certainly had the option initially of filing his suit in the District of Minnesota.

CONCLUSION

As shown by its petition for a Writ of Certiorari, Soo Line Railroad Company, petitioner herein, respectfully submits that the decision and opinion of the Court of Appeals in this action conflicts with holdings of the United States Court of Appeals for the Sixth Circuit. In his opposition to Soo Line's petition, respondent has merely stated generalities and vague conclusions, claiming that the petition presents nothing for review, rather than attempt to show this court factual and legal distinctions between the contentions of the petitioner and the law properly applicable to the case.

BRIEF IN OPPOSITION TO PURPORTED CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI BY RESPONDENT R. H. FULTON

STATEMENT OF THE CASE

In his brief in opposition to Soo Line's petition, respondent claims that the statement of the case in the petition omits significant facts. He does not, however, state to the court what significant facts might have been omitted.

In his purported conditional cross-petition, however, the respondent claims that the Eighth Circuit Court of Appeals refused to pass on his claim that the trial court was in error in charging the jury with regard to the duty of the respective parties for loading of the machinery on the flatcars. That court did, however, deal with respondent's claim in the order denying his petition for rehearing. The court stated that although the trial court's charge in this matter was "perhaps susceptible to improvement, it is a substantially correct statement of the applicable law" (Transcript, Vol. V, p. 56).

ARGUMENT

1. In the first instance, respondent's purported conditional cross-petition is not timely. It presents several questions not raised by Soo Line's original petition, and constitutes nothing more than an attempt to file an original petition for a Writ of Certiorari. This Court's Rule 22(3) provides that a petition for Writ of Certiorari in cases such as this shall be filed in the time prescribed by law. Title

28, Section 2101, U.S.C., states that a party may apply for a Writ of Certiorari only within 90 days from the entry of the judgment sought to be reviewed. In this action, judgment was entered on opinion by the Court of Appeals on April 27, 1973. Motions for rehearing were timely filed and orders entered denying them on June 4, 1973 (Transcript, Vol. V, pp. 56, 59). Therefore, the 90-day period commenced on June 5, 1973, and expired on September 4, 1973. Respondent's petition shows that it was mailed on September 27, 1973.

There is no provision established either by statute or by court rule for a petition for Writ of Certiorari to be filed outside this 90-day period, unless an extension has been granted. Respondent did not apply for an extension, nor was any authorized in this case. Therefore, respondent has not filed his purported conditional cross-petition within the time prescribed by law. It should, therefore, be denied.

2. In argument in support of the contentions in his petition, respondent raises the conflict between the Tenth Circuit and the Sixth Circuit on the issue of pre-emption of actions for common law negligence by the Carmack Amendment. This conflict is discussed earlier in this brief in reply and need not be repeated here. It is significant to note, however, that in the portion of his brief opposing Soo Line's petition for a Writ of Certiorari, the respondent argues that no conflict exists between the Sixth Circuit ruling and that of the Eighth Circuit in the instant case.

As the petitioner has submitted in its petition and in this brief, there is a clear conflict between the Sixth and Eighth Circuits on this issue, because of the different effect given the holding of pre-emption by the Carmack Amendment. Respondent, on the other hand, claims that such

pre-emption does not exist citing *Litvak Meat Co.* v. *Baker*, 446 F. 2d 329 (10th Cir. 1971), discussed above, and claiming that the Ninth Circuit agrees with that view in *Johnson* v. *Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 400 F. 2d 968 (9th Cir. 1968).

Not only does uniformity in interstate commerce demand that pre-emption by the Carmack Amendment obtain, *Adams Express Co.* v. *Croninger*, 226 U. S. 491 (1913), *W. D. Lawson and Co.* v. *Penn Central Co.*, 456 F. 2d 419 (1972), but respondent has erroneously contended that *Johnson* is a holding by the Ninth Circuit refusing to apply the pre-emption doctrine. There was no interstate contract of carriage involved in that case. It was an action under Title 49, Sections 1(4) and 1(11), U.S.C., which establish a carrier's duty to transport goods tendered for interstate shipment. It was not a Carmack case and the question of pre-emption by the Carmack Amendment was not involved.

Moreover, although purporting to adopt the pre-emption doctrine in the instant action, the Eighth Circuit refused to give it the same effect as the Tenth Circuit did in *Lawson*. Therefore, it decided the issue in respondent's favor and it is difficult to understand how this would form a basis for the granting of a writ on cross-petition to respondent.

3. Finally, Fulton claims that it should be granted a Writ of Certiorari on its purported conditional cross-petition, because of numerous errors claimed in the District Court's charge to the jury, which it desires this court to review.

Again, respondent has wasted time by discussing a "shipper's load and count" bill of lading, because such a

bill of lading was not involved in this action. He claims, however, that he did not assume responsibility for loading his machinery on the flatcars. Nevertheless, respondent admits that his employees performed all of the physical acts involved in the loading. Because the railroad's inspector advised and instructed respondent's employees in the method of loading and tying the machinery that would be required to pass his inspection, respondent would contend that this shifted the responsibility for loading from himself back to the railroad. Neither the District Court nor the Court of Appeals found any substance in this empty claim.

The Court of Appeals in stating that whether the Soo inspector was an active supervisor or passive inspector was a hotly contested question does not make it so, because the facts were not really in dispute. The only thing that raised a question was argument by respondent's counsel, not the facts. To contend that because of instructions given him by the Soo Line inspector meant that respondent did not assume the job of loading the flatcars is absurd.

In addition to the question of responsibility for loading, respondent has claimed in his petition that the District Court erred in other portions of his charge to the jury. In none of these matters has the respondent shown any conflict with a decision of another Court of Appeals or this court, nor has he shown that any of them involved an important question of state or federal law, which has not been, but should be, settled by this court. Therefore, it is respectfully submitted that respondent's purported conditional cross-petition presents nothing for this court to review by way of Writ of Certiorari.

CONCLUSION

As clearly shown by the argument presented above respondent's purported conditional cross-petition was not timely and, therefore, this court should have no jurisdiction of it. Furthermore, the questions attempted to be presented by that petition either do not present an issue that would entitle respondent to relief, or fail to present anything of consequence for review. Therefore, it is respectfully submitted that the petition of Soo Line Railroad Company should be granted and respondent's purported conditional cross-petition should be denied.

Respectfully submitted,

ROBERT A. BROWN, SR.
WENDELL E. KOERNER, JR.
BROWN, DOUGLAS AND BROWN
Pioneer Building
St. Joseph, Missouri 64501
Counsel for Petitioner